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In The

Supreme Court of the United States

OCTOBER TERM, 1965

No. 204

RICHARD ALLEN DOWDLE,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

In the Matter of the Application of

MATTHEW T. HOGAN, Esq.,

Petitioner-Appellant,

v.

GORDON HOWE, Director of Finance of the County of Monroe, New York, The Honorable Arthur Levitt, Comptroller of the State of New York, and John C. Little, Jr., District Attorney of Monroe County, New York,

Appellees.

IN THE ABOVE APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

NOTICE OF MOTION TO DISMISS APPEAL AND BRIEF FOR APPELLEE, GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

WILLIAM J. STEVENS, Esq.
Monroe County Legal Adviser
Attorney for Gordon A. Howe, *Appellee,*
Director of Finance of the County of
Monroe, New York

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Rochester, New York

INDEX

	Page
NOTICE OF MOTION TO DISMISS APPEAL	1
BRIEF FOR GORDON A. HOWE, APPELLEE IN SUPPORT OF MOTION	3
Statement of Appellee, Gordon A. Howe	4
Question Presented	5
Statement of the Case	5
Jurisdiction	6
Conclusion	8

Appendix

STATUTE CITATIONS

Section 8 of the Code of Criminal Procedure of the State of New York A1

Section 188 of the Code of Criminal Procedure of the State of New York A1

Section 308 of the Code of Criminal Procedure of the State of New York A1

Section 718 of the County Law of the State of New York A3

Section 722 of the County Law of the State of New York A3

Section 722-a of the County Law of the State of New York A4

Section 722-b of the County Law of the State of New York A4

Section 722-c of the County Law of the State of New York A6

Section 722-d of the County Law of the State of New York A6

Section 722-e of the County Law of the State of New York A7

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NOTICE OF MOTION TO DISMISS APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK BY APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

1. NOTICE is hereby given that APPELLEE GORDON A. HOWE, Director of Finance of the County of Mon-

roe, State of New York, moves to dismiss the appeal herein on the ground that the facts of this case do not bring the appeal within the provisions of Title 28 of the United States Code Section 1257 (2), upon which appellant relies, because no substantial Federal question is presented.

II. That accompanying this Notice of Motion is a Brief for APPELLEE, GORDON A. HOWE.

WHEREFORE, APPELLEE, GORDON A. HOWE respectfully moves this Court for an Order dismissing the appeal herein in all respects.

Respectfully submitted,

Signed: _____

WILLIAM J. STEVENS, ESQ.,
MONROE COUNTY LEGAL ADVISER
Attorney for Gordon A. Howe, Appellee, Director of Finance
of the County of Monroe,
New York
(ROBERT D. CRAIG *of Counsel*)
307 County Office Building
Rochester, New York 14614

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Appellees.

BRIEF FOR APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

STATEMENT OF APPELLEE GORDON A. HOWE, DIRECTOR OF FINANCE OF THE COUNTY OF MONROE, NEW YORK

This appeal is taken from a final judgment of the Court of Appeals of the State of New York unanimously affirming a judgment of the Appellate Division of the Supreme Court of the State of New York which unanimously affirmed, without opinion, a judgment and related Orders of the Monroe County Court of the State of New York, the Court of original jurisdiction in this matter.

Appellant Dowdle, after a preliminary hearing, was examined at the Rochester State Hospital as to his legal sanity and after indictment by the Monroe County Grand Jury for the crime of Assault Second Degree, with intent to commit rape, a felony under the laws of the State of New York, pleaded guilty (while represented by counsel) to the crime as charged in the indictment. After that time, upon application of counsel and argument to the Monroe County Court, Appellant Dowdle was allowed to withdraw his plea of guilty to the felony charge and to plead guilty to the lesser charge of Assault Third Degree and was sentenced to be imprisoned for one year.

Thereafter, motions were made to the Monroe County Court by John Manning Regan, Esq., and his associate Matthew T. Hogan, Esq., the Court assigned Counsel for Appellant Dowdle, for payment of legal fees by the County of Monroe to Messrs. Regan and Hogan and to a psychiatrist, Dr. William Libertson, whose services Messrs. Regan and Hogan had engaged and who had made an examination of Appellant Dowdle and written a letter to counsel which was available to the Court upon Appellant Dowdle's plea to the reduced charge. The Orders of the Monroe County Court denying these motions were appealed and heard with the appeals of the judgment of conviction of Appellant Dowdle and likewise affirmed.

Appellant's statement as to jurisdiction was served on the Attorney for Gordon A. Howe, Appellee, on June 2, 1966.

Copies of this Notice of Motion and Brief were served by mail on June 30, 1966 on John Manning Regan, Esq., and Matthew T. Hogan, Esq., and Appellees Arthur Levitt, Comptroller of the State of New York, and John C. Little Jr., District Attorney of the County of Monroe, New York.

QUESTION PRESENTED

Whether the judgment of the Court of Appeals of the State of New York, in finally affirming the judgment of conviction of Appellant Dowdle and the Orders of the Monroe County Court denying payment of fees to two attorneys, one of whom was assigned as counsel to an indigent accused of a felony assault, and also denying payment of the fee of an expert witness, violated the Constitution of the United States.

STATEMENT OF THE CASE

Appellee states that the judgment of the Court of Appeals was in accord with the laws and the Constitution of the State of New York and the Constitution of the United States.

County Law Section 718 of the Statutes of the State of New York, appended in full, at the time of the commission of the crime and of the judgment of conviction in the Monroe County Court provided that counsel assigned by the Court should serve without compensation in matters other than capital cases.

The Code of Criminal Procedure of the State of New York, Section 308, in force at the above time, clearly intended prior application and authorization by the Court for the

compensable employment of an expert witness in the case of an indigent defendant, especially where the crime charged was not punishable by death or life imprisonment.

In this matter, the expert, a psychiatrist, did not testify at a trial or hearing but wrote a letter containing his opinion to counsel.

In broad aspect, provision had been made in a number of the statutes of the State of New York, so that an indigent accused should not lack for counsel or for fair hearing of his cause at any stage of criminal proceedings brought against him because of indigency alone. Section 308 of the Code of Criminal Procedure *required* that counsel be assigned upon request of the indigent accused.

Nothing contained in County Law Section 722, 722-a, 722-b, 722-c, 722-d and 722-e dealing with these same matters which became law on December 1, 1965 indicated that a retroactive effect was intended by the Legislature of the State of New York as to cases clearly arising and decided before the effective dates of these new statutes.

JURISDICTION

An indigent accused who is permitted to withdraw a plea of guilty to a felony and who is allowed to plead over to a reduced charge of Assault Third Degree, a misdemeanor, after counsel's application and argument to the Court and after the report of an expert has been made available for such purpose, cannot be heard to say that the efforts of counsel *or* expert in his behalf were ineffective.

Approval by the Court for the hiring at public expense of an expert witness is a reasonable procedural safeguard against abuse which does not offend against equal protection of the laws nor the concept of due process. It is preserved in different form in new Section 722-c of the County Law of the State of New York.

The memorandum decision of the Court of Appeals of the State of New York is quoted here in its entirety for its relevancy as to the Federal and State Constitutional questions which were raised before it by the Appellant in his Brief and Argument there.

Decision

"Judgment and order affirmed. Appellant does not demonstrate any legal infirmity in the judgment of conviction for assault, third degree, entered on his plea of guilty. On the appeal from the affirmance of the order denying the application of attorneys for payment of the fee of a psychiatrist retained by the attorneys no constitutional rights of defendant are shown to have been violated since he had the benefit of the physician's services. No rights of the petitioner-attorneys or of the physician were violated by the refusal to pay the fee since no effort was made to secure court authorization in advance of retaining the physician.

No opinion.

All concur."

This decision by the Court of Appeals, in a case brought before it by leave of a Judge of that Court, and practical in approach, capitalizes the effort of the People of the State of New York to insure an indigent of a fair hearing. Appellant Dowdle was first examined psychiatrically at public expense at the direction of the Court and counsel was assigned at his request who represented him according to the canons of Ethics of the Bar Association of the State of New York and his cause was heard three times: once before the Monroe County Court, and twice upon full appeal. He was represented by counsel throughout and benefited from the services of an expert. Any contention that a substantial

question exists as to the denial to Appellant Dowdle of the equal protection of the laws and the due process of law guaranteed by the Constitution of the United States, is controverted by the actual facts in this case.

The rights of this Appellant to counsel, when charged with a crime, were guaranteed by the Constitution of the State of New York Article 1 Section 6, and Sections 8, 188, and 308 of the Code of Criminal Procedure and Section 718 of the County Law of the Laws of the State of New York made thereunder, as well as the Constitution of the United States.

The new sections of the County Law of the State of New York hereinbefore set forth, now contain the more specific mandate of the Legislature as to the manner in which the rights of an indigent accused under the Constitution of the State of New York and the Constitution of the United States are to be secured.

CONCLUSION

Appellee Gordon A. Howe, Director of Finance of the County of Monroe, State of New York, respectfully prays that the Appeal herein be dismissed.

WILLIAM J. STEVENS, ESQ.,
MONROE COUNTY LEGAL ADVISER
Attorney for Gordon A. Howe, Appellee, Director of Finance
of the County of Monroe,
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307 County Office Building
Rochester, New York 14614

APPENDIX

Section 8 of the Code of Criminal Procedure of the State of New York

> "Rights of a defendant in a criminal action
>
> In a criminal action the defendant is entitled
>
> 1. To a speedy and public trial,
> 2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; and
>
> ....."

Section 188 of the Code of Criminal Procedure of the State of New York

> "Magistrate to inform defendant of the charge, and his right to counsel
>
> When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

Section 308 of the Code of Criminal Procedure of the State of New York

> "Defendant appearing for arraignment without counsel to be informed of his right to counsel
>
> If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment may be punished by death or where a defendant under eighteen years of age at the time of the commission of a crime is indicted for such a crime which if committed by an adult might be pun-

ishable by death or on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment imposed in accordance with section ten hundred forty-five, ten hundred forty-five-a, of the penal law, the court in which the defendant is tried, or the trial results in a disagreement of the jury, or the action or indictment is otherwise disposed of, or by which such appeal is determined, or the court in which an action is suspended or discontinued or otherwise disposed of on the ground that the defendant has been heretofore or is hereafter declared incompetent by a duly appointed commission, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with a clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of fifteen hundred dollars in cases where one counsel has been assigned and not exceeding the sum of two thousand dollars in cases where two or more counsel have been assigned. In such a case where it shall appear to the satisfaction of the court that a daily copy of the testimony is necessary to be furnished by the stenographer to the counsel for the defendant upon an order duly signed by the presiding justice that the stenographer furnish the same, the same shall be furnished to the counsel for the defendant, and the cost of said daily copy shall be a charge upon the county. In any case in which experts may be employed as witnesses and in case it shall appear to the satisfaction of the court or a judge thereof that the defendant is not financially able to employ experts, the court to which the indictment is presented or sent or removed for trial or a judge or justice thereof may direct the employment of expert witnesses for the defendant in number not exceeding the number sworn or to be sworn for the prosecution or, where the affirmative presentation of evidence on the issue is incumbent on the defendant, and the prosecution has not indicated any number of experts to be employed, the court or judge may upon satisfactory proof of the necessity therefor, permit the employment of an expert or experts not to exceed two in number, at an expense in the aggregate of not exceed-

ing the sum of ten hundred dollars. Allowances under this section shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court, but no such allowance shall be made unless an affidavit is filed with the clerk of the court by or on behalf of the defendant, showing that he is wholly destitute of means. As amended L. 1963, c. 994, § 4."

Section 718 of the County Law of the State of New York

"Nothing contained herein shall preclude a court on its own motion or upon application by the public defender or by the indigent defendant, from appointing an attorney other than the public defender to represent such defendant or to assist in the representation of such defendant at any stage of the proceedings or on appeal. If such attorney is appointed, he shall serve without compensation, unless such compensation is otherwise provided for by law. Added L. 1961, c. 365, § 2, eff. July 1, 1961."

Section 722 of the County Law of the State of New York

"The board of supervisors of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county by December first, nineteen hundred sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article eighteen-A.

2. Representation by counsel furnished by a private legal aid bureau or society designed by the county or city, organized and operating to give legal assistance and representation to persons charged with a

crime within the city or county who are financially unable to obtain counsel.

3. Representation by counsel furnished pursuant to a plan of a bar association in each county whereby the services of a private counsel are rotated and coordinated by an administrator. Any plan of a bar association must receive the approval of the judicial conference before the plan is placed in operation.

4. Representation according to a plan containing a combination of any of the foregoing.

Any judge, justice or magistrate in assigning counsel pursuant to sections one hundred eighty-eight, three hundred eight and six hundred ninety-nine of the code of criminal procedure shall assign counsel furnished in accordance with a plan conforming to the requirements of this section. Added L. 1965, c. 878, § 1, Dec. 1, 1965."

Section 722-a of the County Law of the State of New York

"For the purpose of this article, the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or any any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof. Added L. 1965, c. 878, § 1, eff. Dec. 1, 1965.

Section 722-b of the County Law of the State of New York

"All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive compensation at a rate not exceeding fifteen dollars per hour for time expended in court or before a magistrate, judge or justice, and

ten dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. Where a defendant is charged with a crime punishable by death or where a defendant under eighteen years of age at the time of the commission of a crime is indicted for a crime which, if committed by an adult, may be punishable by death, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. Where a defendant is charged with one or more other felonies, compensation shall not exceed five hundred dollars. Where a defendant is charged with one or more misdemeanors, compensation shall not exceed three hundred dollars. For representation in an appellate court on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment, imposed in accordance with section ten hundred forty-five or section ten hundred forty-five-a of the penal law, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed five hundred dollars. For representation in an appellate court on an appeal from a judgment of conviction for one or more misdemeanors, compensation shall not exceed three hundred dollars.

For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, servies rendered, expenses in-

curred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided. Added L.1965, c.878, §1, eff. Dec. 1, 1965."

Section 722-c of the County Law of the State of New York

"Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. Added L.1965, c. 878, §1, eff. Dec. 1, 1965."

Section 722-d of the County Law of the State of New York

"Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to

the public defender, private legal aid bureau, or society, private attorney, or otherwise. Added L.1965, c. 878, §1, eff. Dec. 1, 1965."

Section 722-e of the County Law of the State of New York

All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes. Added L. 1965, c.878, §1, eff. Dec. 1, 1965."

STATE OF NEW YORK)
COUNTY OF MONROE } SS.
CITY OF ROCHESTER)

Winifred A. Kelly , being duly sworn, deposes and says that she is employed in the Office of the Monroe County Legal Adviser, and that on the 30th day of June 1966, she deposited in a mail box maintained by the United States Government, in the lobby of the County Office Building, Rochester, New York, two copies of a Motion and Brief securely enclosed in a postpaid wrapper directed to LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for the HONORABLE ARTHUR LEVITT, Comptroller of the State of New York, the Capitol, Albany, New York, 12201, that being the address within the state designated by him for that purpose upon the papers in a prior action upon which this appeal is based, between which places there then was and now is a regular communication by mail. Deponent is over the age of 21 years.

Winifred A. Kelly

Sworn to before me this 30th
day of June 1966.

Robert D Craig

ROBERT D CRAIG

NOTARY PUBLIC, State of N.Y., Monroe County
My Commission Expires March 30, 19 67

STATE OF NEW YORK)
COUNTY OF MONROE) SS.
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Winifred A. Kelly

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Robert D. Craig
ROBERT D. CRAIG
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